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6 UNITED STATES DISTRICT COURT
7 CENTRAL DISTRICT OF CALIFORNIA
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10 TAEK YOON,

11 Plaintiff,

12 Case No. CV 11-6792-VAP (KK)

13 LEE, ET AL.,

14 Defendants.

15 FINAL REPORT AND
16 RECOMMENDATION OF UNITED
17 STATES MAGISTRATE JUDGE

18 This Final Report and Recommendation is submitted to the Honorable
19 Virginia A. Phillips, Chief United States District Judge, pursuant to 28 U.S.C. § 636
20 and General Order 05-07 of the United States District Court for the Central District
of California.

21 I.

22 **SUMMARY OF RECOMMENDATION**

23 On August 7, 2018, defendants Pinedo and Durant specially appeared and filed
24 a Motion to Dismiss for insufficient service of process pursuant to Federal Rule of
25 Civil Procedure 12(b)(5) (“Motion to Dismiss”). ECF Docket No. (“Dkt.”) 126. For
26 the reasons set forth below, the Court recommends GRANTING the Motion to
27 Dismiss and dismissing the claims against Pinedo and Durant without prejudice for
28 failure to serve and failure to prosecute.

II.

PROCEDURAL BACKGROUND

3 On March 17, 2013, Plaintiff constructively filed¹ a Second Amended
4 Complaint (“SAC”) pursuant to 28 U.S.C. § 1983, which includes a claim for
5 deliberate indifference to safety against defendants Pinedo, Saavedra, Gray, and
6 Durant in their individual capacity. Dkt. 33. On May 20, 2013, the assigned
7 Magistrate Judge² issued a Report and Recommendation recommending dismissal of
8 various claims, but finding Plaintiff sufficiently alleged a claim against Defendants
9 Pinedo, Durant, Gray, and Saavedra for failure to protect Plaintiff’s safety. Dkt. 38 at
10 7-9.

11 On March 28, 2014, Plaintiff filed a Third Amended Complaint (“TAC”)
12 alleging a single claim for deliberate indifference to Plaintiff’s serious dental needs in
13 violation of the Eighth Amendment against Defendant Raju. Dkt. 56. On October
14 26, 2016, the Court granted Defendant Raju’s Motion for Summary Judgment and
15 entered Judgment dismissing the action with prejudice. Dkts. 107, 108.

16 On November 28, 2016, Plaintiff appealed the Judgment to the Ninth Circuit.
17 Dkt. 109.

18 On December 21, 2017, the Ninth Circuit found the District Court had failed
19 to address the deliberate indifference to safety claim in the SAC, vacated the
20 Judgment, and remanded for further proceedings as to the deliberate indifference to
21 safety claim only. Dkt. 112.

25 ¹ Under the “mailbox rule,” when a pro se inmate gives prison authorities a pleading
26 to mail to court, the court deems the pleading constructively “filed” on the date it is
27 signed. Roberts v. Marshall, 627 F.3d 768, 770 n.1 (9th Cir. 2010); Douglas v. Noelle,
567 F.3d 1103, 1107 (9th Cir. 2009) (stating the “mailbox rule applies to § 1983 suits
filed by pro se prisoners”).

²⁸ ² On July 7, 2014, the action was transferred to United States Magistrate Judge Kenly Kiya Kato. Dkts. 61, 62.

1 On March 29, 2018, the Court issued Orders directing service of process by the
2 United States Marshal Service (“USMS”) of the SAC on defendants Pinedo, Saavedra,
3 Gray, and Durant. Dkts. 118, 119.

4 On April 23, 2018, Plaintiff submitted four completed USM-285 forms
5 providing information to assist the USMS in serving defendants Pinedo, Saavedra,
6 Gray, and Durant. Dkt. 121. For defendant Pinedo, Plaintiff stated, “On 2006, M.
7 Pinedo was a correctional officer [c/o] of California Rehabilitation Center [CRC]
8 Fac.3 dorm 305, morning through afternoon. Now I am unable to know whether
9 Pinedo is until in CRC or move to other prison as a c/o. If Pinedo is not in CRC, I
10 have no idea whether this paper need to be served to warden of CRC.” Dkt. 122.
11 For defendant Durant, Plaintiff stated: “Sgt. Durant was work as a supervisor in Fac.3
12 program office in CRC on 2006-2007 with other defendants on morning to
13 afternoon.” Dkt. 125.

14 On July 30, 2018, the Court received Process Receipt and Return Forms for
15 defendants Pinedo and Durant from the USMS certifying that service was executed by
16 personal service on July 17, 2018. Dkts. 122, 125.

17 On August 7, 2018, defendants Pinedo and Durant, specially appearing, filed
18 the instant Motion to Dismiss Case pursuant to Federal Rule of Civil Procedure
19 12(b)(5) for insufficient service of process. Dkt. 126. Defendants filed a declaration
20 from Kevin Anthony, the Litigation Coordinator at the California Department of
21 Corrections and Rehabilitation, California Rehabilitation Center in Norco, California
22 (“CRC”) stating that defendant Pinedo “did not work at and had not worked at CRC
23 since 2010” and defendant Durant “did not work at and had not worked at CRC since
24 2009.” Dkt. 126 at 4, Declaration of Kevin Anthony, ¶¶ 1-2.

25 On September 5, 2018, Plaintiff filed an opposition that substantively
26 addressed the Motion to Dismiss filed by defendants Saavedra and Gray, but did not
27 substantively address the Motion to Dismiss filed by defendants Pinedo and Durant
28 alleging insufficient service. Dkt. 128.

1 On September 18, 2018, the Court issued an Order granting Plaintiff leave to
2 conduct limited discovery to effectuate service and an extension of time to submit
3 completed USM-285 forms with sufficient information for the USMS to locate and
4 serve defendants Pinedo and Durant. Dkt. 131. Plaintiff was expressly cautioned that
5 “failure to provide sufficient information to allow the USMS to locate and serve
6 defendants Pinedo and Durant may result in dismissal of Plaintiff’s claims against
7 defendants Pinedo and Durant without prejudice pursuant to Federal Rules of Civil
8 Procedure 4(m) and/or 41(b).” Id. at 3.

9 On October 16, 2018, Plaintiff filed a “Motion for Issuance of Subpoenas”,
10 which appears to be Plaintiff’s response to the Court’s September 18, 2018 Order.
11 Dkt. 134. Plaintiff declines to serve discovery because he does not believe “any of the
12 defendants can provide[] the information about Pinedo and Durant” and requests the
13 Court “reserve the USM-285 FORMS which [are] attached at this motion, to the CRC
14 Warden who can pass the 2 forms to the defendant Pineda and Durant, even [though]
15 Pineda and Duran[t] are in other place[s] or other Prison(s) as a c/o.” Id. at 2. The
16 USM-285 forms that were submitted by Plaintiff were rejected by the Court because
17 the forms are incomplete, in that the service address is missing and Plaintiff instead
18 requested they be served on the CRC Warden “who can find” defendants Durant and
19 Pinedo. Dkt. 135.

20 On November 7, 2018, the Court issued a Report and Recommendation that
21 the Motion to Dismiss should be granted and the claims against Pinedo and Durant
22 should be dismissed without prejudice for failure to serve and failure to prosecute.
23 Dkt. 137.

24 On December 19, 2018, Plaintiff filed Objections, Dkt. 145. In the Objections,
25 Plaintiff argues he that he filed an Opposition to the Motion to Dismiss on
26 September 5, 2018. Dkt. 145. The Court issues the instant Final Report and
27 Recommendation addressing Plaintiff’s Objection in Section III.A. below.

28 The matter thus stands submitted.

III.

DISCUSSION

A. PLAINTIFF'S CLAIMS AGAINST DEFENDANTS PINEDO AND DURANT ARE SUBJECT TO DISMISSAL FOR FAILURE TO SERVE

In cases involving a plaintiff proceeding in forma pauperis, the USMS, upon order of the Court, shall serve the summons and the complaint. Fed. R. Civ. P. 4(c)(2). However, where a pro se plaintiff fails to provide the USMS with accurate and sufficient information to effect service of the summons and complaint, the Court's sua sponte dismissal of the unserved defendants is appropriate. Walker v. Sumner, 14 F.3d 1415, 1421-22 (9th Cir. 1994); Agnes v. Joseph, No. 1:10-CV-00807-LJO, 2012 WL 5424875, at *2 (E.D. Cal. Nov. 6, 2012), report and recommendation adopted, No. 1:10-CV-00807-LJO, 2012 WL 6095042 (E.D. Cal. Dec. 7, 2012) (dismissing unserved defendants after plaintiff failed to take advantage of opportunity to engage in discovery from served defendant to learn forwarding information for unserved defendants).

Here, according to the declaration of Kevin Anthony, the CRC Litigation Coordinator, defendants Pinedo and Durant have not been served. Moreover, despite being given an opportunity to conduct discovery and an extension of time to locate and properly serve defendants Pinedo and Durant, Plaintiff has refused to do so. Therefore, the USMS does not have sufficient information to serve defendants Pinedo and Durant. In addition, Plaintiff's "Motion for Issuance of Subpoenas" must be denied because it fails to seek issuance of subpoenas, but rather seeks service of the complaint based on incomplete USM-285 forms. Finally, Plaintiff's failure to substantively oppose the Motion to Dismiss is construed as consent to granting the Motion to Dismiss. Gerard v. Wells Fargo Bank, N.A., No. CV-14-03935-MMM-SHx, 2015 WL 12780486, at *10 (C.D. Cal. May 19, 2015) (finding failure to

1 substantively address claims in opposition to motion to dismiss is properly construed
2 as consent to granting the motion).

3 Hence, the Motion to Dismiss the claims against defendants Pinedo and
4 Durant should be granted.

5 **B. PLAINTIFF'S CLAIMS AGAINST DEFENDANTS PINEDO AND**
6 **DURANT ARE SUBJECT TO DISMISSAL WITHOUT PREJUDICE**
7 **FOR FAILURE TO PROSECUTE AND COMPLY WITH COURT**
8 **ORDERS**

9 In addition, it is well established that district courts have sua sponte authority
10 to dismiss actions for failure to prosecute or to comply with court orders. See Fed. R.
11 Civ. P. 41(b); Omstead v. Dell, Inc., 594 F.3d 1081, 1084 (9th Cir. 2010) (standard
12 applied in dismissal for failure to prosecute); Hells Canyon Preservation Council v.
13 U.S. Forest Serv., 403 F.3d 683, 689 (9th Cir. 2005) (stating courts may dismiss an
14 action pursuant to Federal Rule of Civil Procedure 41(b) sua sponte for a plaintiff's
15 failure to prosecute or comply with the rules of civil procedure or the court's orders);
16 Ferdik v. Bonzelet, 963 F.2d 1258, 1260 (9th Cir. 1992) (dismissal for failure to
17 comply with any court order).

18 In deciding whether to dismiss for failure to prosecute or to comply with court
19 orders, a district court must consider five factors: "(1) the public's interest in
20 expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the
21 risk of prejudice to the defendants; (4) the public policy favoring disposition of cases
22 on their merits; and (5) the availability of less drastic sanctions." Omstead, 594 F.3d
23 at 1084 (quoting Henderson v. Duncan, 779 F.2d 1421, 1423 (9th Cir. 1986)); see also
24 In re Eisen, 31 F.3d 1447, 1451 (9th Cir. 1994) (failure to prosecute); Ferdik, 963 F.2d
25 at 1260-61 (9th Cir. 1992) (failure to comply with court orders).

26 In the instant action, the first two factors – public interest in expeditious
27 resolution of litigation and the court's need to manage its docket – weigh in favor of
28 dismissal. Despite being given an opportunity to conduct discovery, Plaintiff has

1 expressly refused to provide information necessary for the USMS to serve defendants
2 Pinedo and Durant. This failure to prosecute hinders the Court’s ability to move this
3 case toward disposition, and suggests Plaintiff does not intend to litigate this action
4 diligently.

5 The third factor – prejudice to defendants – also weighs in favor of dismissal.
6 A rebuttable presumption of prejudice to a defendant arises when a plaintiff
7 unreasonably delays prosecution of an action. See Eisen, 31 F.3d at 1452-53.
8 Nothing suggests such a presumption is unwarranted in this case.

9 The fourth factor – public policy in favor of deciding cases on the merits –
10 ordinarily weighs against dismissal. However, it is a plaintiff’s responsibility to move
11 towards disposition at a reasonable pace, and avoid dilatory and evasive tactics. See
12 Morris v. Morgan Stanley, 942 F.2d 648, 652 (9th Cir. 1991). Plaintiff has not
13 discharged this responsibility despite having been (1) instructed on his responsibilities,
14 (2) granted sufficient time in which to discharge them, and (3) warned of the
15 consequences of failure to do so. Under these circumstances, the policy favoring
16 resolution of disputes on the merits does not outweigh Plaintiff’s failure to obey court
17 orders or to file responsive documents within the time granted.

18 The fifth factor – availability of less drastic sanctions – also weighs in favor of
19 dismissal. The Court cannot move the case toward disposition without Plaintiff’s
20 compliance with court orders or participation in this litigation. Plaintiff has shown he
21 is either unwilling or unable to comply with court orders, rules of civil procedure, and
22 local rules by filing responsive documents or otherwise cooperating in prosecuting
23 this action.

24 Finally, while dismissal should not be entered unless a plaintiff has been
25 notified that dismissal is imminent, see West Coast Theater Corp. v. City of Portland,
26 897 F.2d 1519, 1523 (9th Cir. 1990), Plaintiff was warned his “failure to provide
27 sufficient information to allow the USMS to locate and serve defendants Pinedo and
28

1 Durant may result in dismissal of Plaintiff's claims against defendants Pinedo and
2 Durant without prejudice." See Dkt. 131.

3 Hence, the Court recommends dismissing the action against defendants Pinedo
4 and Durant without prejudice for failure to prosecute and comply with court orders.

5 **IV.**

6 **RECOMMENDATION**

7 IT IS THEREFORE RECOMMENDED that the Court issue an Order: (1)
8 accepting this Final Report and Recommendation; (2) GRANTING the Motion to
9 Dismiss; (3) dismissing the claims in the SAC against defendants Pinedo and Durant
10 without prejudice; and (4) DENYING Plaintiff's Motion for Issuance of Subpoenas.

12 Dated: January 8, 2019



13 HONORABLE KENLY KIYA KATO
14 United States Magistrate Judge

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